Nos. 581 and 582

In the Supreme Court of the United States

OCTOBER TERM, 1941

ADOLPH B. SPRECKELS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 22)[1] is reported in 41 B. T. A. 1204. The opinion of the Circuit Court of Appeals (R. 52) is reported in 119 F. (2d) 667.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1941 (R. 66). A petition

[1] The record references will be to the record in No. 581 unless otherwise indicated.

for rehearing was denied on July 28, 1941 (R. 67). A petition for a writ of certiorari was filed on September 3, 1941, and granted on October 20, 1941 (R. 69). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a taxpayer engaged in buying and selling securities and commodities for his own account is entitled to deduct commissions on sales as ordinary and necessary expenses under Section 23 (a) of the Revenue Act of 1934, or whether such commissions must be treated as an offset against the selling price.

2. If such commissions were otherwise deductible from gross income, the further question arises whether in trading for his own account the taxpayer was engaged in "business" within the meaning of Section 23 (a).

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in Appendix A, *infra*, pp. 14–15.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 24–26), part of which were stipulated (R. 24), are substantially as follows:

The taxpayer lives in San Francisco, California. During the taxable years, 1934–1935, he main-

tained an office with employees, and kept a complete set of books on the cash receipts and disbursements basis. He was engaged in purchasing and selling stocks, bonds, and commodities for profit. He paid selling commissions to brokers in connection with such sales as follows: $23,692 in 1934 and $2,246.25 in 1935. In computing his net income on his income-tax returns for the taxable years 1934 and 1935 he did not deduct the selling commissions as ordinary and necessary expenses. His books showed such commissions as offsets against the selling price before net profit or loss was determined (R. 24).

The Commissioner determined deficiencies against the taxpayer with respect to issues no longer in dispute and those deficiencies were in turn partly offset by the taxpayer's claim for refund with respect to deductions on account of stamp taxes which are likewise no longer in dispute. However, after the Board proceedings had been commenced, petitioner attempted for the first time, on June 8, 1939, to amend his petition and seek an additional refund on the ground that he should have been allowed deductions on account of sales commissions (R. 27).

In No. 581, involving the year 1934, the Board determined that since the amendment to the petition was filed more than three years after payment of the 1934 taxes, the taxpayer was precluded from raising the issue by the statute of limita-

tions (R. 26–31, No. 581). In No. 582, however, involving the year 1935, the Board sustained the taxpayer, holding that the deduction should have been allowed.

Upon appeal, the court below found it unnecessary to pass upon the limitations question for the year 1934, since, in its view of the case, the sales commissions were not deductible, and therefore the taxpayer was not entitled to prevail with respect to either year. It accordingly affirmed the judgment in No. 581 (R. 66), and reversed the judgment in No. 582 (R. 45).

SUMMARY OF ARGUMENT

1. This case is the complement to *Helvering* v. *Winmill*, 305 U. S. 79, which held that purchase commissions could not be deducted as expenses under the identical provisions of Section 23 (a) of an earlier revenue act, but that they were to be treated as part of the cost of the securities. Here, petitioner seeks to deduct sales commissions. The regulations, however, have long provided that neither purchase nor sales commissions are deductible, that purchase commissions are to be added to the purchase price, and that sales commissions are to be charged against the selling price.

The Treasury practice has been uniform for many years, with the single exception of sales commissions in the case of "dealers." In view

of certain accounting difficulties that made it impracticable to match selling commissions against sales prices in the case of dealers, the Treasury had permitted the latter to deduct those commissions. Petitioner, however, is not a "dealer," nor does he claim to be such. The change in regulations under the 1932 Act was merely intended to embody the exception that had previously existed in practice with respect to dealers.

The regulations as to sales commissions are fully applicable to petitioner and should be sustained here just as the provisions relating to purchase commissions were sustained in the *Winmill* case. Moreover, the opinion in the *Winmill* case quoted with approval language in *Helvering* v. *Union Pacific Co.*, 293 U. S. 282, 286, which appeared to approve the regulations as applied to both purchase and sales commissions.

2. The decision below is correct upon the additional ground that petitioner's activities in buying and selling securities and commodities on his own account do not constitute "business" within the meaning of Section 23 (a), with the consequence that the amounts in question are in any event not deductible as business expenses.

3. Should the Court rule against the Government upon the merits herein, No. 581 relating to the year 1934 should be remanded for a decision on the statute of limitations issue.

ARGUMENT

I

THE SALES COMMISSIONS WERE NOT DEDUCTIBLE AS EXPENSES; THEY WERE MERELY A CHARGE AGAINST THE SALES PRICE

The issue here presented is the counterpart to the question decided in *Helvering* v. *Winmill*, 305 U. S. 79. In the *Winmill* case this Court held that *purchase* commissions were not deductible as business expenses under Section 23 (a) of the Revenue Act of 1932, but were to be treated as an additional element of cost of the securities purchased.[2] The instant case involves *sales* commissions, and we contend that they are similarly not deductible as business expenses under the identical provisions of Section 23 (a) of the Revenue Act of 1934, but are merely to be treated as a charge against the selling price, reducing *pro tanto* the amount of gain or increasing *pro tanto* the amount of loss upon sale.

The Treasury Regulations over a period of many years have consistently treated commissions paid in purchasing or selling securities as a part

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[2] That result did not mean that the payment of purchase commissions had no tax consequences: it simply meant that by adding the purchase commissions to cost, they would ultimately be reflected in computing the profit or loss upon subsequent resale by the taxpayer. Of course, that profit or loss might be subject to statutory restrictions relating to capital gains and losses, etc.

of the cost or selling price of the securities rather than ordinary expense deductions. Article 8, paragraph 108, of Treasury Regulations 33, Revised, construing the Revenue Act of 1916, c. 463, 39 Stat. 756, provided that:

> *Expense—Commissions paid.*—Commissions paid in purchasing and selling securities are a part of the cost or selling price of the securities and not otherwise deductible. They do not constitute expense deductions in a return of income.

Article 293 of Regulations 45, explaining the Revenue Act of 1918, read in part as follows:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities are an offset against the selling price. * * *

The same language appeared in Article 293 of Treasury Regulations 62, with respect to the Revenue Act of 1921; Article 292 of Treasury Regulations 65, with respect to the Revenue Act of 1924; Article 292 of Treasury Regulations 69, with respect to the Revenue Act of 1926; and Article 282 of Treasury Regulations 74, explaining the Revenue Act of 1928.

The regulations as to purchase commissions had been applied uniformly throughout the years, and were sustained in the *Winmill* case. In applying the regulations as to sales commissions the Treas-

ury had allowed one exception, namely, in the case of dealers in securities. A "dealer" in securities is more than a mere trader; he is "a merchant of securities, * * * with an established place of business, regularly engaged in the purchase of securities and their resale to customers," and, unlike a trader, a dealer is entitled to use inventories under the revenue acts.[3] Since dealers generally purchased securities in large blocks and sold them in smaller lots, and since dealers' sales commissions were often computed and paid on a volume of sales rather than on individual transactions, it was impracticable for a dealer to match his selling commissions against individual sales. In recognition of those accounting difficulties the Treasury permitted dealers to deduct selling commissions as expenses. But in allowing the deductions the Treasury did not concede that they were expenses; rather, it merely permitted them to be treated as expenses in view of the practical accounting difficulties that would be encountered if an attempt were made to charge them against the sales price.[4]

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[3] See e. g., Regulations 86, Article 22 (c)–5.

[4] This method of handling sales commissions ordinarily did not make any difference in a dealer's tax liability; for his gains or losses were not capital gains or losses, and it did not matter to a dealer whether his sales commissions were deducted as expenses or subtracted from the sales price. See, e. g., Section 101 (c) of the Revenue Acts of 1928 (45 Stat. 791) and 1932 (47 Stat. 169), and Section 117 (b) of the Revenue Act of 1934 (48 Stat. 680).

That practice with respect to dealers was finally incorporated into the regulations by the addition of the rather cryptic clause, italicized below, in Article 282 of Regulations 77, under the Revenue Act of 1932:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business expense,* are an offset against the selling price. * * * [Italics supplied.]

The same language appears in Article 24–2 of Treasury Regulations 86, under the Revenue Act of 1934; Article 24–2 of Treasury Regulations 94, under the Revenue Act of 1936; Article 24–2 of Treasury Regulations 101, under the Revenue Act of 1938, and Section 19.24–2 of Treasury Regulations 103, under the Internal Revenue Code.

The reason for the change and the meaning of the new provisions were thereafter fully explained in G. C. M. 15430, XIV–2 Cum. Bull. 59,[5] which is reproduced in full in Appendix B, *infra*, pp. 16–20.

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[5] We fully recognize that G. C. M. 15430 is merely an informal ruling, and, as such, does not have the same dignity as a regulation for the purpose of construing the statute. But the Court is justified in referring to it to ascertain what the Treasury practice *in fact* has been, just as it may seek enlightenment from any source as to actual administrative practice. And in this case, G. C. M. 15430 accurately describes the administrative practice, and supplies an explanation for an otherwise inexplicable change in the regulations.

Thus, these new provisions were not intended to effect any change in practice; they were intended merely to accord recognition to the exceptional situation that had existed all along with respect to dealers. The regulations, both before and after the change have been cited with approval by this Court in *Helvering* v. *Union Pacific R. Co.*, 293 U. S. 282, 286:

> * * * commissions [paid for marketing bonds] do not differ from brokerage commissions paid upon the purchase or sale of property. The regulations have consistently treated such commissions, not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax.

And this statement was quoted with apparent approval in the *Winmill* decision. 305 U. S. at 83.

We respectfully submit that these principles should be controlling, and that the *Winmill* case should be followed here.[6] Indeed, petitioner him-

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[6] The *Winmill* case itself originally involved sales as well as purchase commissions, both of which had been allowed as expense deductions by the Circuit Court of Appeals. The Government sought certiorari only as to the purchase commissions, since a direct conflict existed at that time only with respect to purchase commissions. (*Hutton* v. *Commissioner*, 39 F. (2d) 459 (C. C. A. 5th).) As a consequence of the limited character of the writ in the *Winmill* case, the Second Circuit thereafter continued to adhere to its former decision as to sales commissions, although it appeared to bow to this

self treated the sales commissions as a charge against selling price on his own books (cf. *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 187), and there is no sound basis for any distinction between purchase and sales commissions. Except in the case of dealers—and petitioner does not contend that he is a dealer—the administrative practice has been just as long continued and consistent with respect to sales commissions as it has been with respect to purchase commissions. That practice which was sustained in the *Winmill* case should govern here.

II

THE DEDUCTIONS ARE IN ANY EVENT NOT ALLOWABLE AS EXPENSES BECAUSE THE RECORD DOES NOT SHOW THAT PETITIONER WAS ENGAGED IN CARRYING ON A "TRADE OR BUSINESS" WITHIN THE MEANING OF SECTION 23 (a)

Although the court below did not pass upon this question, its decision may nevertheless be supported upon the further ground (cf. *Helver-*

Court's decision as to purchase commissions. Cf. *Neuberger* v. *Commissioner*, 104 F. (2d) 649, reversed on other grounds, 311 U. S. 83. The court below, however, as well as the Fifth Circuit (*Commissioner* v. *Covington*, 120 F. (2d) 768, pending on petition for certiorari, Nos. 693–694, this Term) realistically ruled that no sound distinction could be drawn between purchase and sales commissions and that this Court's decision in the *Winmill* case should govern in the case of sales commissions.

ing v. *Gowran*, 302 U. S. 238, 245) that petitioner was not engaged in "business" within the meaning of Section 23 (a). See page 2 of Government's memorandum in response to the petition for certiorari herein. While it is true that the Board of Tax Appeals purported to find that the taxpayer "was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit" (R. 24), that finding was made under the mistaken understanding of the meaning of "business" as used in the revenue acts. In these circumstances that finding is not conclusive here. Cf. *United States* v. *Pyne*, 313 U. S. 127. If petitioner were merely engaged in buying and selling securities on his own account and managing his investments, such activities do not constitute "business" as a matter of law. *United States* v. *Pyne, supra; Higgins* v. *Commissioner*, 312 U. S. 212, 218; *City Bank Co.* v. *Helvering*, 313 U. S. 121. Of course, if petitioner wishes to adduce any additional evidence relevant to the issue of his "business" activity, the proper procedure would be to remand this case for further proceedings as was done in the *Pyne* case.[7] Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 560.

As we pointed out in our answer to the petition for certiorari, the court below did not pass upon the question of limitations, since the decision on

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[7] Upon remand of the *Pyne* case the Court of Claims in June 1941 dismissed the taxpayer's petition.

the merits made it unnecessary to consider the limitations issue. However, if this Court should reverse on the merits, we request that No. 581 (relating to the year 1934) be remanded for a decision on the question of limitations.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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Special Assistants to the Attorney General.

FEBRUARY 1942.

APPENDIX A

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * * (U. S. C., Title 26, Sec. 23).

Treasury Regulations 86, explaining the Revenue Act of 1934:

> ART. 23 (a)-1. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 23 (b)-1 to 23 (q)-1. Double deductions are not permitted. Amounts deducted under one provision of the Act cannot again be deducted under any other provision of the Act. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. (See article 22 (a)-5.) Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles

used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see article 23 (a)–2), advertising and other selling expenses, * * *.

ART. 24–2. *Capital expenditures.*—* * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price. * * *

APPENDIX B

G. C. M. 15430, XIV-2 Cum. Bull. 59 (1935):

REVENUE ACT OF 1934

Buying commissions are a part of the cost of securities and are not deductible as ordinary and necessary business expenses. Selling commissions are an offset against the sale price and are not deductible as ordinary and necessary business expenses, except in the case of a dealer in securities.

An opinion is requested whether commissions paid in connection with sales of securities are deductible as ordinary and necessary business expenses under section 23 (a) of the Revenue Act of 1934, or whether they should be used as an offset against the selling price of the securities in computing gain or loss.

The question as to the deductibility of such commissions involves three classes of taxpayers—(1) a dealer in securities, (2) a trader in securities, and (3) a taxpayer who purchases and sells securities occasionally but not in such quantities or under such circumstances as to constitute him either a dealer or a trader. (Cf. G. C. M. 9656, C. B. X-2, 127, G. C. M. 9958, C. B. X-2, 158, and article 22 (c)-5 of Regulations 86 for the distinction between a dealer and a trader.

Fundamentally, commissions paid in connection with both purchases and sales of securities, being direct expenses of acquiring and disposing of the property, are direct charges against the profit, or increase the loss, arising from the transaction. The expenses incurred in consummating the purchase and sale necessarily affect the amount of the profit or loss. The position of the Treasury Department, which has been in effect for many years, is expressed by paragraph 108 of Regulations 33, revised, construing the Revenue Act of 1916, which provides that:

> *Expense—Commissions paid.*—Commissions paid in purchasing and selling securities are a part of the cost or selling price of the securities and not otherwise deductible. They do not constitute expense deductions in a return of income.

Article 293 of Regulations 45 reads in part as follows:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities are an offset against the selling price. * * *

The same language appears in article 293 of Regulations 62, article 292 of Regulations 65, article 292 of Regulations 69, and article 282 of Regulations 74. Article 282 of Regulations 77 and article 24-2 of Regulations 86 read in part as follows:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business*

expense, are an offset against the selling price. * * * [Italics supplied.]

The language of all the Revenue Acts from the Revenue Act of 1913 to and including the Revenue Act of 1934 is substantially identical insofar as the provisions affecting the present issue are concerned. It is well settled that where a statute has been construed for a long period of time as having a certain meaning, a reenactment of that statute without change indicates legislative sanction of the construction previously given it. * * *

* * * * *

Since, fundamentally, commissions on both purchases and sales are direct charges to the profit or loss arising from the particular sales in connection with which they are paid, there can be no justification for a departure from that method of treatment except in those cases where the detail of accounting on that basis is so burdensome as to make its use impracticable. No such accounting difficulties exist in the case of any of the three classes of taxpayers enumerated above except the *dealer*. Both the occasional seller and the trader are required to account in their income-tax returns for the profit or loss on each individual sale. The right to inventory securities is denied to the trader and to the occasional seller. (See article 22 (c)–5, Regulations 86.) In so accounting, no difficulty whatever is experienced in adding the purchase commission to the cost of of the security and deducting the sale commission from the selling price thereof. In the case of the dealer, no accounting difficulty is experienced in

adding the purchase commission to the cost and he is required to do so in all cases instead of treating such commissions as current expenses even where he is permitted to inventory his securities. However, in the dealer's accounting there are difficulties which make it impracticable for him to match his selling commissions against each individual sale. The dealer usually buys in large quantities, his sales are numerous and in relatively small amounts, his commissions are often computed and paid on a volume of sales instead of on individual transactions, and where he uses inventories he necessarily departs widely from the principle of accounting for the profit on each individual purchase and sale. The Commissioner has recognized these difficulties and in actual practice has permitted the dealer in securities to treat his selling commissions as "ordinary and necessary business expenses," not because they are technically such but because of practical considerations. However, no formal recognition was given this practice until the promulgation of Regulations 77, when, in article 282, there was inserted the qualifying phrase "when such commissions are not an ordinary and necessary business expense." This language should not be construed as holding that selling commissions are to a trader "ordinary and necessary expenses * * * in carrying on any trade or business" within the meaning of section 23 (a) of the Revenue Act of 1934 and corresponding provisions of prior Revenue Acts.

In reaching this conclusion there has not been overlooked that part of article 23 (a)–1 of Regulations 86, which provides that—

> Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 23 (b)–1 to 23 (q)–1. * * * Among the items included in business expenses are management expenses, commissions, * * *—

or similar articles of earlier regulations. Commissions are paid for many other services beside negotiating purchases and sales of securities. Furthermore, these regulations recognize that the rule stated therein is subject to exception in the class of cases dealt with in this memorandum. Article 23 (a) 1 concludes with this sentence: "As to items not deductible under any provision of section 23, see section 24." The earlier regulations contain similar exceptions.

It is concluded, therefore, that buying commissions are a part of the cost of securities and are not deductible as ordinary and necessary business expenses. Selling commissions are an offset against the sale price and are not deductible as ordinary and necessary business expenses, except in the case of a dealer in securities.

U. S. GOVERNMENT PRINTING OFFICE 1942

SUPREME COURT OF THE UNITED STATES.

Nos. 581 and 582.—October Term, 1941.

Adolph B. Spreckels, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 16, 1942.]

Mr. Justice Black delivered the opinion of the Court.

During 1934 and 1935, the petitioner bought and sold stocks, bonds, and commodities. In connection with the sales, he paid selling commissions to brokers, and in his books these commissions were deducted from selling price before net profit or loss was determined. In his income tax returns for 1934 and 1935, he treated the commissions similarly, not making deductions for them as ordinary and necessary business expenses. In 1939, however, in the course of proceedings before the Board of Tax Appeals,[1] the petitioner asserted that he was entitled to tax refunds for the reason that his failure to make deductions for the commissions had resulted in overpayment in both years. The Board sustained his contention in part, holding that the selling commissions could properly have been deducted as ordinary and necessary business expenses, that the refund claimed for 1935 should be allowed, but that the refund claimed for 1934 was barred by the applicable statute of limitations. 41 B. T. A. 1204. The Circuit Court of Appeals reversed, holding that the claimed deductions for selling commissions were not permissible, and finding it unnecessary therefore to determine whether the refund claim for 1934 was timely. 119 F. 2d 667. Because of a conflict in decisions of Circuit Courts of Appeal,[2] we granted certiorari to consider the question: Are sales commissions paid by a taxpayer engaged in

[1] These proceedings had been initiated in connection with other issues, not relevant here.

[2] With the decision below and Commissioner v. Covington, 120 F. 2d 768 (C. C. A. 5), compare Winmill v. Commissioner, 93 F. 2d 494 (C. C. A. 2), and Neuberger v. Commissioner, 104 F. 2d 649 (C. C. A. 2).

the business of buying and selling securities[3] deductible as ordinary and necessary expenses under Section 23(a) of the Revenue Act of 1934,[4] or are they to be treated as offsets against selling price relevant only to the determination of capital losses or gains?

In *Helvering* v. *Winmill*, 305 U. S. 79, we held that a taxpayer who bought and sold securities could not deduct the commissions paid on his *purchases* as a business expense. Although the *Winmill* case arose under the Revenue Act of 1932, the statutory provisions and regulations there relevant are identical with those again in controversy here. And the conclusion we reached there—that a general regulation[5] designating "commissions" as one of a long list of deductible business expenses is not controlling in the face of a specific regulation pertaining to commissions on securities transactions—is equally applicable here.

The specific regulation pertaining to securities transactions provides:

"Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price. . . ."[6]

If there is any justification for treating sales commissions differently from purchase commissions, it must depend upon the significance of the clause "when such commissions are not an ordinary and necessary business expense." This clause first appeared in Treasury Regulations 77, accompanying the Revenue Act of 1932. In the income tax regulations prior to that time, it was consistently prescribed that commissions paid on purchases and sales of securities were to be treated as part of the cost or

[3] Although the petitioner alleges that some of the commissions were paid on sales of commodities, it does not appear from the record that the petitioner asked for separate treatment of these commissions before either the Board of Tax Appeals or the Circuit Court of Appeals. Nor was such separate treatment requested before this Court.

[4] 48 Stat. 680, 688. The statute provides:

"In computing net income there shall be allowed as deductions:

"(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered. . . ."

[5] "Among the items included in business expenses are . . . commissions . . . advertising and other selling expenses . . . ." Article 121 of Treasury Regulations 77, under the Revenue Act of 1932; Article 23(a)-1 of Treasury Regulation 86, under the Revenue Act of 1934.

[6] Article 282 of Treasury Regulations 77, under the Revenue Act of 1932; Article 24-2 of Regulations 86, under the Revenue Act of 1934.

selling price and were not otherwise to be deductible.[7] And in *Helvering* v. *Union Pacific Co.*, 293 U. S. 282, 286, this Court expressly recognized that such commissions have been "consistently treated . . . not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale."

What, then, is the significance of the qualifying clause first appearing in the Regulations of 1932, and what effect is to be given to it? Prior to the formal adoption of the Regulations of 1932, the Commissioner of Internal Revenue permitted one exception to what appears to have been an otherwise uniform practise of treating commissions on the sales of securities as mere offsets against selling price. This exception was made in the case of the dealer in securities, one who "as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom."[8] It reflects the view that there are practical considerations of accounting convenience which make it as difficult for such dealers in many instances to set commissions off against the proceeds of individual sales as it would be for the merchant of other wares to treat his selling expenses only as a series of subtractions from the selling price realized on particular items of his stock.[9] Incorporation of the clause "when such commissions are not an ordinary and necessary business expense" was intended to provide formal recognition for an established business usage, based on the peculiar necessities of securities dealers, a usage to which the Commissioner had already given informal acquiescence.[10] For the casual buyer and seller of securities, or even for the large scale trader on his own account, as here, the practical obstacles to treating sales commissions as offsets against selling price do not exist. In this very case, for example, the taxpayer apparently found it more convenient to follow this method in keeping his own business records.

We therefore conclude that the clause "when such commissions are not an ordinary and necessary business expense" was intended

[7] See, *e. g.*, Article 8, par. 10 of Treasury Regulations 33, Revised, under the Revenue Act of 1916; Article 293 of Treasury Regulations 45, under the Revenue Act of 1918.

[8] See Article 22(c)-5 of Treasury Regulations 86, under the Revenue Act of 1934.

[9] See Bureau of Internal Revenue, G. C. M. 15430, XIV-2 Cum. Bull. 59 (1935).

[10] *Ibid.*

to be and is controlling only in the case of securities dealers.[11] In the case of a trader on his own account where there are no compelling practical grounds for treating sales commissions as such an expense, we find no persuasive reason for distinguishing, under the statute and regulations, between sales commissions like those before us and purchase commissions like those of the *Winmill* case. The judgment of the court below is accordingly

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[11] As the government points out in its brief, a dealer's tax liability under the Revenue Acts of 1932 and 1934 would ordinarily have been the same whether the commissions he paid on sales were treated as deductible business expenses or offsets against selling price. For in general, his gains or losses would not have been capital gains or losses as defined in those acts. See Section 101(c)(8) of the Revenue Act of 1932, 47 Stat. 169, 192; Section 117(b) of the Revenue Act of 1934, 48 Stat. 680, 714.